IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-1739

NAOMI TELLEZ,
Plaintiff-Appellant,

v.

JOANNE B. BARNHART,
Commissioner, Social Security Administration
Defendant-Appellee.

Appeal From the United States District Court
For The Southern District of Iowa
Hon. Charles R. Wolle, Presiding

APPELLANT'S BRIEF

John A. Bowman
Bowman & DePree, L.L.C.
617 Brady Street
Davenport, Iowa 52803
Phone: (563) 323-6685

Thomas A. Krause
Thomas A. Krause, P.C.
701 34th Place
West Des Moines, Iowa 50265
Phone: (515) 223-1771

COUNSEL FOR APPELLANT
NAOMI TELLEZ

SUMMARY AND REQUEST FOR ORAL ARGUMENT

This case involves the denial of Supplemental Security Income benefits based on disability. She was denied benefits and exhausted her administrative remedies. Ms. Tellez's mental impairments adversely affect her ability to work. Her claim is supported by reports, statements, and testimony from the treating psychiatrist, the treating nurse practitioner, a consultative examiner, the non-examining state agency psychological consultants, the Vocational Rehabilitation counselor, a visiting nurse, a case manage, a Social Security Claims Representative, and the claimant's sister.

Ms. Tellez requests oral argument in order to distill the issues presented to the Court. This case brings together several threads found in a number of recent cases from this Court regarding the evaluation of a treating physician's opinion. Perhaps more importantly, this case involves the ALJ's duty to fully and fairly develop the medical evidence regarding work-related limitations if he rejects the treating psychiatrist's opinions. This case also raises the issue of averaging earnings when determining whether work is presumptively "substantial gainful activity." Finally, this case is unique in the variety of third party statements from individuals who are not family members. In determining Ms. Tellez's credibility, the ALJ failed to consider the credibility of these individuals as well.

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JURISDICTIONAL STATEMENT

Appellant Naomi Tellez appeals from the unreported decision of the United States District Court for the Southern District of Iowa, Central Division, the Hon. Charles R. Wolle presiding. The district court affirmed the final decision of the Commissioner of Social Security denying Supplemental Security Income benefits to Ms. Tellez.

This matter was filed in the district court as an action for the judicial review of a claim for disability benefits pursuant to 42 U.S.C. §1383(c)(3), *incorporating* 42 U.S.C. §405(g). The basis for jurisdiction in this Court is 28 U.S.C. §1291.

The district court's order on the merits, dismissing the Complaint and disposing of all parties' claims, was entered January 26, 2004. The judgment pursuant to F.R.Civ.P. 58 was filed that same day. The Notice of Appeal was timely filed on March 23, 2004.

STATEMENT OF THE ISSUES

STANDARD OF REVIEW FOR ALL ISSUES

Davis v. Apfel, 239 F.3d 962 (8th Cir. 2001)
Gavin v. Heckler, 811 F.2d 1195 (8th Cir. 1987)
Lowe v. Apfel, 226 F.3d 969 (8th Cir. 2000)

I. MS. TELLEZ HAS NOT ENGAGED IN SUBSTANTIAL GAINFUL ACTIVITY AT ANY TIME RELEVANT TO HER CLAIM FOR BENEFITS.

20 C.F.R. §416.973
20 C.F.R. §416.974
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II. THE ALJ ERRED AS A MATTER OF LAW IN HIS REJECTION OF THE OPINION OF THE TREATING PSYCHIATRIST, DR. THOMAS A. GARSIDE, AND THE TREATING NURSE PRACTITIONER, MS. FLAHERTY.

Shontos v. Barnhart, 328 F.3d 418 (8th Cir. 2003)
Lauer v. Apfel, 245 F.3d 700 (8th Cir. 2001)
Wilder v. Chater, 64 F.3d 335 (7th Cir. 1995)
20 C.F.R. §416.927

III. THE ALJ FAILED TO PROPERLY WEIGH THE OPINION OF THE VOCATIONAL COUNSELOR, JENNIFER MARME-LOWERY.

Ekeland v. Bowen, 899 F.2d 719 (8th Cir. 1990)
Jelinek v. Bowen, 870 F.2d 457 (8th Cir.1989)
Laird v. Ramirez, 884 F.Supp. 1265 (N.D. Iowa 1995)
20 C.F.R. §416.904

IV. THE ALJ FAILED TO EVALUATE MS. TELLEZ'S CREDIBILITY ACCORDING TO THE POLASKI STANDARD AND SSR 96-7P.

Cline v. Sullivan, 939 F.2d 560 (8th Cir. 1991)
Forehand v. Barnhart, — F.3d — 2004 WL 875721 (8th Cir. April 26, 2004)
Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984)
SSR 96-7p

PRELIMINARY STATEMENT

This case involves the judicial review of a claim for disability benefits under the Supplemental Security Income program. Ms. Tellez was denied benefits as her condition was not expected to be disabling for twelve full months, as required by statute. She appealed and, though her condition did not improve, she was denied benefits administratively.

The substantial evidence test requires the Court to look at the evidence that detracts from the final decision of the Commissioner. There is an abundance of such evidence. The ALJ applied the wrong standard to the medical opinions in this case. The ALJ proceeded to vaguely find the opinions of the treating psychiatrist were not consistent with the "record as a whole." The opinions of the treating nurse practitioner that Ms. Tellez was severely limited and disabled were consistent with the treating psychiatrist's opinions and were ignored. The opinions of the consultative psychiatrist were ignored. The opinions of the state agency psychological consultant that Ms. Tellez was disabled (but expected to improve) was given little weight. The opinion of Ms. Tellez's counselor at Vocational Rehabilitation was ignored. The evidence from Ms. Tellez's visiting nurse was ignored. The evidence from Ms. Tellez's case manager was ignored. The observations by a Social Security Administration employee were ignored. The

statement from Ms. Tellez's sister was ignored. The ALJ's decision is not supported by any evidence, much less substantial evidence.

STATEMENT OF FACTS

NATURE AND COURSE OF PROCEEDINGS BELOW

Naomi Tellez filed her application for Supplemental Security Income benefits based on disability[1] on March 8, 2000 (protective filing date). (A.R. at 227, 228) She was denied initially and on reconsideration (A. R. At 213, 220) Ms. Tellez timely filed a request for hearing. (A.R. at 225) The administrative hearing was held March 21 and June 27, 2002 before Administrative Law Judge (ALJ) John P. Johnson. (A.R. at 145, 199)

Following the administrative hearing, Ms. Tellez's claim was denied on April 22, 2002 (A. R. at 23) In evaluating Ms. Tellez's claim, the ALJ followed the familiar five-step sequential evaluation process outlined in 20 C.F.R. §416.920.[2]

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[1] The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(l)(A), §1382c(a)(3)(A). The ALJ must determine the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis, *i.e.*, 8 hours a day, for 5 days a week. Social Security Ruling (SSR) 96-8p.

[2] The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §416.920(a). The

(A.R. at 24) First, the ALJ noted Ms. Tellez had not engaged in substantial gainful activity, except for November 2000. He also noted some evidence of substantial gainful activity in early 2001, but made no finding to their effect. (A.R. at 24, 39) At the second step, the ALJ found Ms. Tellez's impairments included major depressive disorder with dysthymia, a personality disorder, asthma, obesity, and a medically determinable impairment with complaints of lower back pain, foot pain, and ankle pain. (A.R. at 24, 39-40) The ALJ next found Ms. Tellez's impairments did not meet or equal the Listings of Impairments, 20 C.F.R. Part 404, Subpt P., Appendix 1. (A.R. at 25, 39-40)

Commissioner determines: (1) whether the claimant is engaged in substantial gainful activity, and if he is, disability benefits are denied; (2) whether the claimant has a medically severe impairment or combination of impairments that significantly limits the claimant's physical or mental ability to perform basic work activities, including walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and remembering simple instructions, use of judgment, responding appropriately to supervision, co-workers, and usual work situations, and dealing with changes in a routine work setting; (3) whether the impairment is equivalent to one of a number of listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity, and if so, the claimant is disabled; (4) whether the impairment prevents the claimant from performing work he has performed in the past; (5) if the claimant is able to perform his previous work, he is not disabled; however, if the claimant cannot perform past work, the burden shifts to the Commissioner to prove that the claimant is able to perform other work in the national economy in view of [her] age, education, and work experience. *See* Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Lewis v. Barnhart, 353 F.3d 642, 645 (8th Cir. 2003).

In ascertaining whether Ms. Tellez could return to her past work or any other work, the ALJ determined Ms. Tellez's residual functional capacity (RFC), finding:

> The claimant has the residual functional capacity to perform the physical exertional and nonexertional requirements of work with the following limitations: can lift no more than 50 pounds occasionally and 25 pounds frequently, cannot be exposed to excessive heat, humidity, cold, or more than moderate levels of dust or fumes, can do only simple, routine, repetitive work, not requiring constant attention to detail, can have no more than occasional contact with the public, co-workers, and supervisors, but would require occasional supervision, can do no more than regular paced work, and can tolerate only a mild to moderate level of stress.

(A.R. at 33, 40) Relying on the vocational expert's testimony, the ALJ determined that, given Ms. Tellez's RFC, she was unable to perform her past relevant work. (A.R. at 38, 40) Relying further on the vocational expert's testimony, the ALJ determined that there was other work Ms. Tellez could perform.(A.R. at 38-39, 40-41) As a result, the ALJ determined Ms. Tellez was not disabled and not entitled to benefits. (A.R. at 41)

Ms. Tellez sought review by the Appeals Council. (A.R. at 3). On November 21, 2002, the Appeals Council denied review. (A.R. at 1G) As a result, the ALJ's decision stands as the final decision of the Commissioner.

MEDICAL EVIDENCE

Ms. Tellez received multiple mental health services from the Vera French Community Mental Health Center and also received assistance from Vocational Rehabilitation. From January 1999 until November 2001, Ms. Tellez was a frequent visitor to Vera French. She attended counseling sessions with Jerry Lowe on some 44 occasions; saw Annabelle Flaherty, ARNP, for 14 medication checks; and saw Dr. Thomas A. Garside, a psychiatrist, three times for medications checks.[3] (A.R. at 471-74)

Naomi Tellez's history of mental illness predates her claim to benefits in March 2000. She attempted suicide in June 1995. (A.R. at 59) She began receiving mental health treatment at Vera French Community Mental Health Center by 1998. She was in crisis in February 1998. She returned on April 1, 1998. She was starting management training at Wendy's and was not sure she was ready for the training. Ms. Tellez was seen for an emergency session on January 6,1999. Her complaints included depression, as well as inability to function. She had quit her job at Wendy's in August. She was crying during the interview, with complaints of no energy and sleeping excessively. Also, she was experiencing severe financial problems. (A.R. at 384)

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[3] In addition, Ms. Tellez had a case manager through Vera French. (A.R. at 181-83)

She was a little better when she was seen on January 12, but had to be seen again on an emergency basis on January 14. Apparently she had tried working at Iowa Beef Processors, but had been unable to handle it. She again seemed a little better when she returned for medication check on March 15, 1999, although she did indicate she was having some trouble with "road rage" and controlling her temper. She walked into the Center without an appointment on May 12, experiencing more problems with depression and irritability. By that time, she had a job at APAC in telemarketing. In the meantime, she continued to meet with her counselor, Jerry Lowe. (A.R. at 384)

When seen in August, 1999, she was "not doing so hot." She was tearful and said her medications were not working, that she was a "rollercoaster." Other complaints included bad headaches, insomnia and nausea. The day prior to this, she told Mr. Lowe she was going to be fired from her job due to poor performance. (A.R. at 384-85) She appeared depressed and irritable, and described a general loss of interest and lack of libido. Diagnoses included recurrent major depression, dysthymia, and a personality disorder. She had lost her job by the time she was seen on September 2, 1999. She was crying and feeling that no help was available. (A.R. at 384-85)

Ms. Tellez had obtained another job by the time she saw Mr. Lowe on September 17, 1999. That involved working in the food department at a local college. She was doing fairly well when seen for individual therapy on November 1, 1999. However, a note from her case manager dated December 8, 1999 indicated she had been fired from her job. (A.R. at 385)

Ms. Tellez was not seen again until March 15, 2000.[4] She was once again working at Wendy's, but said she could not stand the pressure there. She described feeling socially isolated and said she had to force herself to work. She was still experiencing multiple problems with her children. Her medication made her drowsy, so a trial of Seroquel was initiated. She walked into the Center without an appointment on March 17, saying the Seroquel made her dizzy, so the dose was decreased. When she returned for medication check on March 24, 2000, she said she was still having financial problems and had cried all day the previous day. (A.R. at 385)

On April 12, 2000, Dr. Garside reviewed in great detail Ms. Tellez's longitudinal course of treatment at Vera French. (A.R. at 384-85) Vera French,

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[4] As Ms. Tellez filed only for Supplemental Security Income benefits and filed her application on March 8, 2000, she is entitled to benefits beginning April 1, 2000 and need prove disability only back to the time of application. *See* 20 C.F.R. §416.335.

then, provided a team approach to Ms. Tellez's mental health care. The opinions offered by Dr. Garside and Ms. Flaherty reflected the clinical judgments of the several professionals who had interacted with and observed Ms. Tellez over time. Their opinions were based on a longitudinal perspective of Ms. Tellez.(A.R. at 384-85)

When seen on April 17, 2000, she had been fired (again) from her job. She saw Dr. Thomas Garside for a medication check on April 28, 2000. She complained of not being able to sleep. Diagnosis at that time was Borderline Personality Disorder. She said she was looking for work in June, 2000. Ms. Tellez's eleven year old daughter died in November 2000. When she saw Annabelle Flaherty, ARNP on November 13, 2000, she indicated that her daughter's death was compounding her already existing financial problems. She discussed some suicidal ideations but agreed not to harm herself. (A.R. at 463)

Mr. Lowe saw her on November 20, 2000. She still did not know the cause of her daughter's death and expressed guilt that she should have done something to prevent it. At the beginning of 2001, Ms. Tellez talked of problems sleeping, that she had a hard time getting up and going to work. She expressed irritability with some mood swings. She appeared to be under severe stresses. When Ms. Tellez saw Ms. Flaherty on February 7, 2001, she was still working at Burger King.

On June 14, she was "not doing so well". She was still having trouble sleeping at night and felt depressed. She would rather stay to herself than talk to the people she worked with. Her deceased daughter's birthday was that month as well as the birthday of another child who had died eight years earlier. (A.R. at 463) Diagnostic assessment at this time was major depression. She continued to have problems and was "barely making it" in August 2001. She appeared somewhat less depressed but was still apprehensive about her present and future. (A.R. at 464)

On September 10, 2001, she was not feeling very well. Goals in treatment were to reduce her depression and improve her self- esteem. (A.R. at 464) In June 2002, she was admitted to a partial hospitalization program. (A.R. at 597)

On June 28, 2002, Dr. Garside and Ms. Flaherty submitted a joint statement concerning Ms. Tellez's work-related abilities. (A.R. at 599-603) They found Ms. Tellez was markedly or extremely limited in a number of work-related areas, including the ability to relate to other people, maintain attention, maintain regular attendance, complete a normal workday and workweek without interruptions from psychologically based symptoms, perform at a consistent pace, and respond appropriately to changes in a routine work setting. (A.R. at 599-602) Dr. Garside and Ms. Flaherty noted that psychological discomfort interfered with her ability to focus, sustain work, and relate to others. (A.R. at 603)

STANDARD OF REVIEW FOR ALL ISSUES

This Court's task on review is to determine whether the Commissioner's decision is supported by substantial evidence in the record as a whole. *See* Davis v. Apfel, 239 F.3d 962, 966 (8th Cir. 2001)*;* Lowe v. Apfel, 226 F.3d 969, 971 (8th Cir. 2000). When evaluating the evidence, the Court must perform a balancing test, evaluating contradictory evidence. Sobania v. Secretary of HHS, 879 F.2d 441, 444 (8th Cir. 1989); Gavin v. Heckler, 811 F.2d 1195, 1199 (8th Cir. 1987). In determining substantiality, the court must also balance the weight of the evidence that detracts from the Commissioner's decision. Hunt v. Massanari, 250 F.3d 622, 624 (8th Cir. 2001); Baker v. Apfel, 159 F.3d 1140, 1144 (8th Cir. 1998).

A reviewing court must also ascertain whether the ALJ's decision is based on legal error. Lauer v. Apfel, 245 F.3d 700, 702 (8th Cir. 2001); Berger v. Apfel, 200 F.3d 1157, 1161 (8th Cir. 2000). The Court may reverse the Commissioner's decision if the ALJ applies an erroneous legal standard. Banks v. Massanari, 258 F.3d 820, 823 (8th Cir. 2001); Lowe v. Apfel, 226 F.3d 969, 971 (8th Cir. 2000).

SUMMARY OF ARGUMENT

As an initial matter, the ALJ noted Ms. Tellez attempted to work for several months after filing for benefits. Only one month's earnings rose above the amount considered "substantial gainful activity." The regulations and the Commissioner's

policy statements require the ALJ to average wages. The ALJ did not. The ALJ found that the only month where earnings rose above the presumptive substantial gainful activity level was, in fact, substantial gainful activity. In addition, the ALJ failed to consider that the work was performed under special circumstances.

Second, the ALJ erred as a matter of law in his rejection of the opinion of the treating psychiatrist, Dr. Thomas A. Garside, and the treating nurse practitioner, Annabelle Flaherty. While the ALJ found Ms. Tellez was moderately limited in three or four areas, Dr. Garside and Ms. Flaherty found she was more seriously impaired in more areas. Their opinions are inconsistent with the ability to work. The Commissioner's regulations require that, under certain circumstances, the treating psychiatrist's opinion must be given controlling weight. As the diagnosis is well-established and Dr. Garside's opinion is consistent with all of the other medical opinions in the record, the ALJ should have given that opinion controlling weight.

If not entitled to controlling weight, the treating psychiatrist's opinion generally is still entitled to great weight. The ALJ must review specific factors outlined in the regulations in evaluating medical opinions. In this case, the ALJ gave some general reasons that do no rise to the level of specificity required by the regulations and this Court.

Alternatively, the ALJ failed to obtain medical opinions regarding Ms. Tellez's limitations. A number of recent cases from this Court have emphasized the ALJ's duty to fully and fairly develop the medica evidence regarding work related limitations. If the ALJ did not agree with the opinions of Dr. Garside, Ms. Flaherty, and Dr. Hoover, the ALJ should have recontacted the treating sources or arranged for a consultative evaluation.

The ALJ also failed to properly weigh the opinion of the vocational counselor, Jennifer Marme-Lowery. Ms. Marme-Lowery had worked directly with Ms. Tellez and had the opportunity to observe her strengths and weaknesses. Instead, the ALJ posed a hypothetical question to a government-paid vocational expert who had never observed Ms. Tellez before the hearing.

Finally, the ALJ failed to evaluate Ms. Tellez's credibility according to the Polaski Standard and SSR 96-7p. The ALJ failed to identify any significant inconsistencies in the record as a whole. The ALJ ignored entirely the third party observations of Sue Himes, family support worker; Karen Havenicht, case monitor at Vera French; Ms. C. McKanna, a claims representative for the Social Security Administration; Terri Hudnall from Frontier Supported Community Living Program; and Kismet J. James, Naomi's sister.

ARGUMENT

I. MS. TELLEZ HAS NOT ENGAGED IN SUBSTANTIAL GAINFUL ACTIVITY AT ANY TIME RELEVANT TO HER CLAIM FOR BENEFITS.

The ALJ found that Ms. Tellez engaged in "substantial gainful activity" in November 2001 and that there was "some evidence" that Ms. Tellez's earnings in the first six months of 2001 constituted substantial gainful activity. (A.R. at 24, 39) These findings are legally wrong.

First, as the ALJ noted, Ms. Tellez worked at a Krispy Kreme doughnut shop from October 2001 until January 2002, and in November 2001 her earnings were $923.52 per month. The ALJ found her earnings constituted substantial gainful activity for November 2001.[5] (A.R. at 24) This is legally wrong. Rather than looking at each month individually, the ALJ should have averaged the earnings to determine whether these earnings constituted substantial gainful activity. *See, e.g.,* 20 C.F.R. §416.974(b)(1) ("We will generally average your earnings for comparison with the earnings guidelines"); 20 C.F.R. §416.974a(a) ("To determine your initial eligibility for benefits, we will average any earnings you make during the month you file for benefits and any succeeding months"). In fact, the Commissioner has issued a

[5] For 2001, average earnings of more than $740.00/month were presumed to constitute substantial gainful activity. 20 C.F.R. §416.974(b)(2)(ii); *see* 65 **FED.REG.** 82,905, 82,906 (Dec. 29, 2000).

Social Security Ruling devoted to this issue. *See* SSR 83-35 (Averaging of Earnings in Determining Whether Work is Substantial Gainful Activity). From October to December 2001, Ms. Tellez earned a total of $1,839.62 at Krispy Kreme. (A.R. at 249) These earnings average approximately $613.21/month. This is below the amount presumed to constitute substantial gainful activity. The ALJ erred as a matter of law in finding Ms. Tellez's work in November 1991 constituted substantial gainful activity.

Second, the ALJ failed to make any specific finding that Ms. Tellez's work did, in fact, constitute substantial gainful activity. (A.R. at 24, 39) The ALJ referred to Ex. 9D, page 4. (A.R. at 24) That exhibit contains only one page. (A.R. at 1B) It is not clear what evidence the ALJ intended to refer to. Even if Ms. Tellez's earnings were presumed to exceed the substantial gainful activity threshhold, the ALJ failed to even consider whether Ms. Tellez's employment was part of an unsuccessful work attempt. 20 C.F.R. §416.974(c).

More importantly, the ALJ failed to recognize the assistance given to Ms. Tellez necessary to make this work possible. In determining whether work constitutes substantial gainful activity, the ALJ must consider whether the work was done under special conditions. 20 C.F.R. §416.973(c).

Ms. Tellez was born in February 1965 and was 35 years old at the time she filed her application for benefits. (A.R. at 228) Prior to 1996, the most she had ever earned in a year was $2,502.01. (A.R. at 247) In 1995, Ms. Tellez was referred to Vocational Rehabilitation Services by the Visiting Nurses Association. (A.R. at 312) From at least 1997 to August 2000, she received services from the Visiting Nurses Association. (A.R. at 479-576, 588-94) She had a case monitor from Vera French Community Mental Health Center. (A.R. at 181-83) Her worker from Vera French assisted Ms. Tellez in applying for disability benefits. (A.R. at 268) With all this assistance, Ms. Tellez was able to work and earn over $9,000/year in 1998 and 1999. (A.R. at 247)

Even then, Ms. Tellez had trouble holding a job; in 1998 she had two jobs and in 1999 she worked for some five employers. (A.R. at 238) She still was unable to earn minimum wage for full-time work over the course of a year. Dr. Cynthia Hoover, the consultative examiner, noted in January 2001 that, "History will most likely repeat itself and she will probably become overwhelmed and unable to keep her job at Burger King." (A.R. at 440) As even the state agency psychological consultant noted, Ms. Tellez's condition deteriorated in 2000 and she became unable to work. (*See* A.R. at 445)

The ALJ erred in finding Ms. Tellez's work in November 2000 was substantial gainful activity and, to the extent he used her work in 2001 as evidence she was capable of performing substantial gainful activity, in failing to consider Ms. Tellez's need for assistance in obtaining and maintaining employment. *See* 20 C.F.R. §416.973(c)(4) (You were able to work only because of specially arranged circumstances).

II. THE ALJ ERRED AS A MATTER OF LAW IN HIS REJECTION OF THE OPINION OF THE TREATING PSYCHIATRIST, DR. THOMAS A. GARSIDE, AND THE TREATING NURSE PRACTITIONER, MS. FLAHERTY.

The Commissioner has acknowledged the unique position of the treating physician, stating:

> Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.

20 C.F.R. §416.927(d)(2); *see* Lewis v. Callahan, 125 F.3d 1436, 1440 (11th Cir. 1997).

The treating physician's continuing relationship with the claimant makes him especially qualified to evaluate reports from examining doctors, to integrate the

medical information they provide, and to form an overall conclusion as to functional capacities and limitations, as well as to prescribe or approve the overall course of treatment. Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1996).

Because treating physicians are employed to cure and thus have a greater opportunity to know and observe the patient as an individual, their opinions are given greater weight than the opinions of other physicians. Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996) (citations omitted). "The treating physician has the best opportunity to observe and evaluate a claimant's condition." Hancock v. Secretary of the Dep't of HEW, 603 F.2d 739, 740 (8th Cir. 1979). As a result, this Court has on repeated occasions emphasized that the treating physician's evidence must be given great weight, with deference to the physician's findings over an examining physician or consultant. Bergmann v. Apfel, 207 F.3d 1065 (8th Cir. 2000); Whitehurse v. Apfel, 158 F.3d 987 (8th Cir. 1998); Smith v. Apfel, 157 F.3d 571 (8th Cir. 1998); Trossauer v. Chater, 121 F.3d 341 (8th Cir. 1997); Metz v. Shalala, 49 F.3d 374, 378 (8th Cir. 1995); Thompson v. Sullivan, 957 F.2d 611, 614 (8th Cir. 1992); Henderson v. Sullivan, 930 F.2d 19, 21 (8th Cir. 1991); Thompson v. Bowen, 850 F.2d 346, 349 (8th Cir. 1988); Hancock v. Secretary of the Dep't of Health, Educ. and Welfare, 603 F.2d 739, 740 (8th Cir. 1979). This approach is also consistent with Social Security regulations which grant a treating

physician's opinion controlling weight when it is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the case. *See* 20 C.F.R. §416.927(d)(2); SSR 96-2p.

A. The ALJ's Conclusions Regarding Ms. Tellez's Mental Residual Functional Capacity and the Opinions of Dr. Garside and Ms. Flaherty.

Regarding Ms. Tellez's mental limitations, the ALJ found she:

> can do only simple, routine, repetitive work, not requiring constant attention to detail, can have no more than occasional contact with the public, co-workers, and supervisors, but would require occasional supervision, can do no more than regular paced work, and can tolerate only a mild to moderate level of stress.

(A.R. at 33, 40)

Ms. Tellez received multiple mental health services from the Vera French Community Mental Health Center and also received assistance from Vocational Rehabilitation. From January 1999 until November 2001, Ms. Tellez was a frequent visitor to Vera French. She attended counseling sessions with Jerry Lowe on some 44 occasions; saw Annabelle Flaherty, ARNP, for 14 medication checks; and saw Dr. Thomas A. Garside, a psychiatrist, three times for medications checks.[6] (A.R.

[6] In addition, she had a case manager through Vera French. (A.R. at 181-83)

at 471-74) On April 12, 2000, Dr. Garside reviewed in great detail Ms. Tellez's longitudinal course of treatment at Vera French. (A.R. at 384-85) Vera French, then, provided a team approach to Ms. Tellez's mental health care. The opinions offered by Dr. Garside and Ms. Flaherty reflected the clinical judgments of professionals who had interacted with and observed Ms. Tellez over time.[7] Their opinions were based on a longitudinal perspective of Ms. Tellez. *See* Shontos v. Barnhart, 328 F.3d 418, 426 (8th Cir. 2003).

On June 28, 2002, Dr. Garside and Ms. Flaherty submitted a joint statement concerning Ms. Tellez's work-related abilities. (A.R. at 599-603) They found Ms. Tellez was markedly or extremely limited in a number of work-related areas, including the ability to relate to other people, maintain attention, maintain regular attendance, complete a normal workday and workweek without interruptions from psychologically based symptoms, perform at a consistent pace, and respond appropriately to changes in a routine work setting. (A.R. at 599-602) Dr. Garside and Ms. Flaherty noted that psychological discomfort interfered with her ability to

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[7] Ms. Flaherty is a "medical source" under 20 C.F.R. §416.913(d)(1). As such, Ms. Flaherty's opinion must be evaluated under 20 C.F.R. §416.927. Duncan v. Barnhart, — F.3d —, 2004 WL 936686 (Mar. 10, 2004); Shontos v. Barnhart, 328 F.3d 418, 426 (8th Cir. 2003). The ALJ failed to recognize Ms. Flaherty as a medical source. Ironically, this is the same ALJ and the same nurse practitioner as in the Shontos case.

focus, sustain work, and relate to others. (A.R. at 603) As Ms. Tellez's attorney noted, a "marked" limitation in any of these areas justified a finding that Ms. Tellez was disabled. (A.R. at 603)

The opinions of Dr. Garside and Ms. Flaherty stand in stark contrast to the conclusions of the ALJ. For the reasons stated below, the ALJ erred in failed to give the opinions of Dr. Garside and Ms. Flaherty controlling weight and, as a result, erred in failing to find Ms. Tellez disabled.

B. The ALJ Should Have Given Controlling Weight to the Opinions of Dr. Garside and Ms. Flaherty.

The regulations out a framework for analyzing a treating source's opinion. The regulations state:

> If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.

20 C.F.R. §416.927(d)(2); *see* SSR 96-5p.

The ALJ must determine whether the treating physician's opinion as to the nature and severity of claimant's impairments is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record;" if so, the ALJ must give it

controlling weight. 20 C.F.R. §416.927(d)(2); *see* Shontos v. Barnhart, 328 F.3d 418, 425 (8th Cir. 2003); Holmstrom v. Massanari, 270 F.3d 715, 720 (8th Cir. 2001); Prosch v. Apfel, 201 F.3d 1010, 1012-13 (8th Cir. 2000).

As to the second requirement, that the treating source opinions are entitled to "controlling weight" if not "not inconsistent" with other substantial evidence, one court recently noted:

> Pursuant to Ruling 96-8p, the ALJ must give controlling weight to the treating source's opinion if it is "not inconsistent" with other substantial evidence in the record, *accord* 20 C.F.R. §404.1527(d)(2) [20 C.F.R. §416.927(d)(2)]; the opinion need not, as the ALJ stated, be "consistent" with the record. This is not merely a semantic issue. The "not inconsistent" standard presumes the opinion's prominence and requires the ALJ to search the record for inconsistent evidence in order to give the treating source's opinion less than controlling weight.

Dominguese v. Massanari, 172 F.Supp.2d 1087, 1100 (E.D. Wis. 2001); *see* Shontos, 328 F.3d at 418.[8]

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[8] In Shontos, this Court noted:

> The ALJ's assertion that these source's opinions were inconsistent with the record, and therefore should not be afforded controlling or great weight, is not borne out by the record. At most, the record is deficient in documentation to support their opinions, e.g., documentation in the record regarding Ms. Shontos' attendance.

Shontos, 328 F.3d at 426-27.

In this case, the ALJ applied the wrong legal standard and stated Dr. Garside's opinion would be given controlling weight only if "consistent" with the record as a whole. (A.R. at 33) Had he applied the proper legal standard and given the treating sources' the prominence required by the regulations, he would have been compelled to give those opinions controlling weight.

Returning to the first prong, the opinions from Dr. Garside and Ms. Flaherty are well-supported by the medically acceptable diagnostic techniques. The diagnoses from Dr. Garside and Ms. Flaherty are supported by the appropriate diagnostic techniques. Dr. John C. Garfield and Dr. Carole Davis Kazmierski, non-examining psychologists from Disability Determinations Services, confirmed the diagnoses of an affective disorder and a personality disorder. (A.R. at 386, 419)

As to the second prong, the opinions from Dr. Garside and Ms. Flaherty are consistent with the record as a whole. As an initial matter, Ms. Flaherty is a "medical source" whose opinion must be considered by the ALJ. *See* 20 C.F.R. §416.913(d)(1); Shontos v. Barnhart, 328 F.3d 418, 426 (8th Cir. 2003). The ALJ erred as a matter of law in failing to recognize Ms. Flaherty as a medical source and in considering her opinions, as well as Dr. Garside's opinions. This is important here as the ALJ failed to recognize that Dr. Garside's opinions are consistent with

Ms. Flaherty's opinions. The opinions of the treating psychiatrist are consistent with the opinions of the treating nurse practitioner.[9]

The opinions from Dr. Garside and Ms. Flaherty are also consistent with the report from the only other examining medical source, Dr. Cynthia Hoover. Dr. Hoover performed a consultative examination on January 4, 2001. (A.R. at 437-40) Ms. Tellez appeared quite frazzled when Dr. Hoover first met her and remained anxious. Ms. Tellez's mood was depressed as she cried several times during the interview. Her thoughts were slow and concentration was "off." (A.R. at 438) Dr. Hoover had to repeat several questions. (A.R. at 438) Dr. Hoover's assessment was that Ms. Tellez had a chronic dysthymia with superimposed major depression. Her depression had worsened and she was trying to keep her part-time job at Burger King. Dr. Hoover believed Ms. Tellez was doing the best that she could. She seemed capable of interacting with coworkers and the public on only a limited basis. She seemed prone to have public crying spells, outbursts and anger. Ms. Tellez would become flustered when overwhelmed. (A.R. at 439) Dr. Hoover concluded that "History will most likely repeat itself and she will probably become overwhelmed and unable to keep her job at Burger King." (A.R. at 440) Dr.

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[9] Jerry Lowe, Ms. Tellez's counselor at Vera French, did not give any opinions regarding work-related limitations. (*See* A.R. at 463-64)

Hoover's report is consistent with disability.[10] Dr. Hoover's report is also consistent with the opinions of Dr. Garside and Ms. Flaherty.

The opinions from the non-examining state agency psychological consultants are also consistent with Dr. Garside's opinions. The ALJ failed to note, and apparently failed to realize, that Dr. Kazmierski found Ms. Tellez was currently disabled (as of her review in February 2001), but that Dr. Kazmierski believed Ms. Tellez would be able to return to work within twelve months.[11] (A.R. at 419, 445) In

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[10] A claimant may be unable to engage in substantial gainful activity when he can find employment and physically perform certain jobs, but cannot hold the job for a significant period of time. Gatliff v. Commissioner, 172 F.3d 690, 693-94 (9th Cir. 1999) (citing cases from all circuits); Dix v. Sullivan, 900 F.2d 135, 138 (8th Cir. 1990); Parsons v. Heckler, 739 F.2d 1334, 1340-41 (8th Cir. 1984); Tennant v. Schweiker, 682 F.2d 707, 710-11 (8th Cir. 1982).

[11] Dr. Kazmierski's notes are not entirely clear on this point. The notice of decision issued as a result of Dr. Kazmierski's assessment is, perhaps, a little clearer:

> The records do indicate that your condition became severe in November, 2000, when a personal situation occurred. As a result, the information does show that you may not be capable of working at the present time while you recover. However, with continued treatment, your condition is expected to improve on or before November, 2001. Prior to November, 2000, the information shows that you would have had the ability to perform work which is simple and routine in nature, such as your past work as a janitor or fast foods worker. Additionally, the information shows that your condition is expected to show improvement on or before November, 2001, at which time you would be capable of performing work which is similar to your past work as a janitor or fast foods worker as the jobs are generally performed in the

February 2001, Dr. Kazmierski may have reasonably believed Ms. Tellez's condition would improve by November 2001, but her prediction as to Tellez's work-related abilities nine months into the future cannot be seen as inconsistent with Dr. Garside's opinions.

Further, the opinions of the two non-examining state agency psychological consultants are consistent with Ms. Tellez's claim of disability. Dr. John C. Garfield found Ms. Tellez "often" had deficiencies of concentration, persistence, and pace. (A.R. at 386, 393). Similarly, Dr. Kazmierski found Ms. Tellez had a "moderate" degree of limitation in that area. (A.R. at 429) When Brian Paprocki, the vocational expert, was asked to assume Ms. Tellez "often" had deficiencies in concentration, persistence, and pace, he testified she would not be capable of any type of competitive employment. (A.R. at 196)

The opinions from both treating medical sources, Dr. Garside and Ms. Flaherty, are "not inconsistent" with the evidence of record, including the consultative examination from Dr. Hoover; the assessments from the non-examining psychologists, Dr. Garfield and Dr. Kazmierski; the report from Ms. Himes at the Visiting Nurses Association; the report from Ms. Marme-Lowery, the Vocational

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national economy.

(A.R. at 221); *see* footnote 1, *supra*.

Rehabiliation counselor; the testimony from the case monitor from Vera French; the observations of the Claims Representative; and the statement from Ms. Tellez's sister. The ALJ simply found that the opinions from Dr. Garside were not consistent with the record as a whole. (A.R. at 33) Not only is this the wrong legal standard, it is factually incorrect. This matter should be remanded for the payment of benefits.

C. THE ALJ FAILED TO EVALUATE THE OPINIONS FROM DR. GARSIDE AND MS. FLAHERTY USING THE FACTORS OUTLINED IN 20 C.F.R. §416.927.

As argued above, the opinions from Ms. Flaherty and Dr. Garside should have been given controlling weight. Alternatively, the regulatory framework still requires they be given significant weight:

> Adjudicators must remember that a finding that a treating source medical opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the case record means only that the opinion is not entitled to "controlling weight," not that the opinion should be rejected. Treating source medical opinions are still entitled to deference and must be weighed using all of the factors provided in 20 CFR 404.1527 and 416.927. ***In many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight.***

SSR 96-5p; *see* Shontos, 328 F.3d 418, 426 (8th Cir. 2003); 20 C.F.R. §416.927(d)(2).[12] The ALJ must "always give good reasons . . . for the weight [he gives the] treating source's opinion." 20 C.F.R. §416.927(d)(2); *see* Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000); Prosch v. Apfel, 201 F.3d 1010, 1012-13 (8th Cir. 2000); Jenkins v. Apfel, 196 F.3d 922, 924-25 (8th Cir. 1999). In the decision's narrative discussion section, the ALJ "must . . . explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved." SSR 96-8p.

In this case, the ALJ did not weigh Dr. Garside's opinions and Ms. Flaherty's opinions utilizing the regulatory factors. This alone is error. Utilizing the regulatory framework, it is clear that the only reasonable conclusion is that Ms. Tellez is disabled.

The first several factors are intertwined and relate to the length of the treatment relationship and the frequency of examination as well as the nature and extent of the treatment relationship. As previously noted, from January 1999 until November 2001, Ms. Tellez attended counseling sessions with Jerry Lowe on some 44 occasions; saw Annabelle Flaherty, ARNP, for 14 medication checks; and saw

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[12] These factors include length of the treatment relationship and the frequency of examination; nature and extent of the treatment relationship; supportability; consistency; specialization; and other factors.

Dr. Thomas A. Garside, a psychiatrist, three times for medications checks. (A.R. at 471-74) More importantly, the ALJ ignored the institutional history incorporated into the team approach. *See* Benton v. Barnhart, 331 F.3d 1030, 1037 (9th Cir. 2003). In Benton, the Ninth Circuit noted the Shontos court found that the use of a "team approach by medical providers is analytically significant."[13] Benton, 331 F.3d at 1037.

Next, supportability and consistency must be considered. As previously argued, Dr. Hoover, the consultative psychiatrist essentially found Ms. Tellez unable to maintain competitive employment and expected her to lose her part-time position at Burger King. (A.R. at 439-40) Dr. Kazmierski, the state agency psychological consultant, found Ms. Tellez disabled in February 2001, but predicted she would not be disabled for twelve months. (A.R. at 445) The opinions of the two non-examining state agency psychological consultants, combined with the testimony of the vocational expert, support Dr. Garside's opinions that Ms. Tellez was disabled. (A.R. at 386, 393, 429, 196). Sue Himes, Family Support

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[13] The Benton decision cites the Shontos decision issued March 7, 2003. *See* Shontos v. Barnhart, 322 F.3d 532, 539 (8th Cir. 2003). Upon the Commissioner's petition for rehearing, that opinion was withdrawn and two minor changes made. The only change relevant here is that, in the first opinion, the Court referred to Ms. Flaherty and Ms. Bookmeyer as "acceptable medical sources" rather than "medical sources."

Worker, noticed Ms. Tellez's depression made her unable to sleep, very tearful, and sometimes unable to leave her home. Ms. Tellez was very depressed, very emotional, and talked of suicide. (A.R. at 477) Similarly, Terri Hudnall from Frontier Supported Community Living Program, noted Ms. Tellez had episodes of severe depression and hopelessness. (A.R. at 478) Jennifer Marme-Lowery, Ms. Tellez's counselor at Vocational Rehabilitation, also believed Ms. Tellez was unable to work full-time on a competitive basis. (A.R. at 114) Karen Havenicht, Ms. Tellez's case monitor at Vera French, testified Ms. Tellez had crying spells lasting more than a half hour, isolated herself, and shut down. (A.R. at 181-83) The Social Security Administration's claims representative noted Ms. Tellez was emotionally unstable. (A.R. at 268) The statement from Ms. Tellez's sister also confirms her instability. (A.R. at 340-41) The evidence as a whole is consistent with, and supports, a finding of disability.

The ALJ cited only two general reasons for failing to accept the opinions of Dr. Garside and Ms. Flaherty. The ALJ stated Dr. Garside's opinion was "at odds with the actual work record of this claimant, as well as the record as a whole." (A.R. at 33) Ms. Tellez's actual work record, discussed previously, is one of marginal employment that was only possible with the assistance of a Vocational Rehabilitation counselor, a visiting nurse, numerous therapy sessions, a case

manager, and family support. The “record as a whole” is, without more, a meaningless phrase. Given the evidence supportive of Ms. Tellez’s claim there is nothing left in the record to support the ALJ’s decision.

D. ALTERNATIVELY, THE ALJ FAILED TO OBTAIN MEDICAL OPINIONS REGARDING MS. TELLEZ'S LIMITATIONS.

A "claimant's residual functional capacity is a medical question.” Lauer v. Apfel, 245 F.3d 700, 704 (8th Cir. 2001), *quoting* Singh v. Apfel, 222 F.3d 448, 451 (8th C ir. 2000). "[S]ome medical evidence," Dykes v. Apfel, 223 F.3d 865, 867 (8th C ir. 2000) (per curiam), must support the determination of the claimant's RFC, and the ALJ should obtain medical evidence that addresses the claimant's "ability to function in the workplace," Nevland v. Apfel, 204 F.3d 853, 858 (8th Cir. 2000) *quoted in* Lauer, *supra*. Therefore, although in evaluating RFC, the ALJ was not limited to considering medical evidence, the ALJ was required to consider at least some supporting evidence from a professional and medical evidence was required to establish how claimant's impairments affected his RFC. *See* Lauer, 245 F.3d at 704; Nevland, 204 F.3d at 858. An administrative law judge may not draw upon his own inferences from medical reports. Nevland v. Apfel, 204 F.3d 853, 858 (8th Cir. 2000); Landess v. Weinberger, 490 F.2d 1187, 1189 (8th Cir. 1974). As Judge Posner from the Seventh Circuit noted, "Severe depression is not the

blues. It is a mental illness; and health professionals, in particular psychiatrists, not lawyers or judges, are the experts on it." Wilder v. Chater, 64 F.3d 335, 337 (7th Cir. 1995).

Even assuming the ALJ correctly rejected the opinions of Dr. Garside, Ms. Flaherty, Dr. Hoover, the ALJ erred in failing to fully and fairly develop the record. *See* Snead v. Barnhart, 360 F.3d 834 (8th Cir. 2004);[14] Battles v. Shalala, 36 F.3d

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[14] In Snead, the Court stated:

> Normally in Anglo- American legal practice, courts rely on the rigors of the adversarial process to reveal the true facts of a case. *See, e.g.*, Schaal v. Gammon, 233 F.3d 1103, 1106 (8th Cir. 2000) (*quoting* Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)). *See generally* Valerie P. Hans, The Jury's Role in Administering Justice in the United States: U.S. Jury Reform: The Active Jury and the Adversarial Ideal, 21 **ST. LOUIS. U. PUB.L.REV.** 85, 87-88 (2002) (contrasting the adversarial process with the continental European "inquisitorial" process). However, social security hearings are non- adversarial. *See* Reeder v. Apfel, 214 F.3d 984, 987 (8th Cir. 2000). *See generally* Jeffrey S. Wolfe & Lisa B. Proszek, Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer, 33 **TULSA L.J.** 293, 295 (1997) (discussing some of the jurisprudential difficulties associated with the non-adversarial nature of social security hearings). Well-settled precedent confirms that the ALJ bears a responsibility to develop the record fairly and fully, independent of the claimant's burden to press his case. *See* Nevland, 204 F.3d at 858; Landess v. Weinberger, 490 F.2d 1187, 1188 (8th Cir. 1974). The ALJ's duty to develop the record extends even to cases like Snead's, where an attorney represented the claimant at the administrative hearing. See Warner v. Heckler, 722 F.2d 428, 431 (8th C ir. 1983).

43, 44 (8th Cir. 1994) (noting that the Commissioner and claimants' counsel both share the goal of assuring that disabled claimants receive benefits). If the ALJ did not believe that the professional opinions available to her were sufficient to allow him to form an opinion, he should have further developed the record to determine, based on substantial evidence, the degree to which Ms. Tellez's impairments limited her ability to engage in work-related activities. *See* Lauer v. Apfel, 245 F.3d 700 (8th Cir. 2001); Hutsell v. Massanari, 259 F.3d 707, 712 (8th Cir. 2001).

The ALJ can do so by recontacting the treating physician. *See* 20 C.F.R. §416.912(e); 20 C.F.R. §416.927(c)(3); SSR 96-5p; *see also* Bowman v. Barnhart, 310 F.3d 1080, 1085 (8th Cir. 2002); Nevland v. Apfel, 204 F.3d at 858; Bishop v. Sullivan, 900 F.2d 1259, 1263 (8th Cir. 1990); Mitchell v. Bowen, 827 F.2d 387, 389 (8th Cir. 1987); O'Leary v. Schweiker, 710 F.2d 1334, 1342 (8th C ir. 1983); Lewis v. Schweiker, 720 F.2d 487, 489 (8th Cir. 1983) (If record is incomplete,

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> The ALJ possesses no interest in denying benefits and must act neutrally in developing the record. *See* Richardson v. Perales, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) ("The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts."); Battles v. Shalala, 36 F.3d 43, 44 (8th Cir. 1994) (noting that the Commissioner and claimants' counsel both share the goal of assuring that disabled claimants receive benefits).

Snead v. Barnhart, 360 F.3d 834, 838 (8th Cir. 2004).

ALJ is obligated to “address a precise inquiry to the physician so as to clarify the record.").

If the ALJ was not able to obtain the necessary evidence from Dr. Garside, he should have ordered a consultative examination. *See* Lauer, 245 F.3d at 704; Nevland v. Apfel, 204 F.3d 853, 858 (8th Cir. 2000) (the ALJ should obtain medical evidence that addresses the claimant's ability to function in the workplace); *see also* 20 C.F.R. §416.919a(b).

As the ALJ relied upon his own view of the medical evidence rather than the evidence from a mental health professional, reversal is appropriate.

III. THE ALJ FAILED TO PROPERLY WEIGH THE OPINION OF THE VOCATIONAL COUNSELOR, JENNIFER MARME-LOWERY.

The ALJ failed to properly consider the opinion of Jennifer Marme-Lowery, Ms. Tellez's Vocational Rehabilitation counselor. The Eighth Circuit found an ALJ to have committed legal error by ignoring the findings of the claimant's vocational expert and instead relying on the testimony of a government vocational consultant responding to a hypothetical question. Jelinek v. Bowen, 870 F.2d 457, 460-62 (8th C ir. 1989). The Eighth Circuit noted that, although determinations of disability made by agencies other than the SSA are not binding on the Social Security Administration, *see* 20 C.F.R. §416.904, the ALJ erred by failing to give the proper weight to the Iowa State Vocational Rehabilitation Facility (ISVRF) evaluation.[15] *Id*. According to Jelinek, an ALJ may not completely ignore the reasoned opinion of qualified vocational experts in favor of the opinion of a government vocational consultant, particularly when the government expert's opinion is elicited through a

[15] The Eighth Circuit's reference to "another agency" is confusing as the Iowa Disability Determination Services, the state agency responsible for making disability determinations for the Social Security Administration at the initial and reconsideration levels, is a part of the Division of Vocational Rehabilitation of the Iowa Department of Education. *See* Laird v. Ramirez, 884 F.Supp. 1265, 1268 (N.D. Iowa 1995); *see also* http://www.state.ia.us/educate/about/partners/vrs/index.html.

hypothetical question that does not accurately reflect the factual record. Jelinek, 870 F.2d at 460; Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990).

In 1995, Ms. Tellez was referred to Vocational Rehabilitation Services by the Visiting Nurses Association. (A.R. at 312) According to the March 2002 report from Jennifer Marme-Lowery, Ms. Marme-Lowery had worked with Naomi Tellez for more than three years and Ms. Tellez had worked with the Iowa Division of Vocational Rehabilitation Services (DVRS) since July 1995. (A.R. at 114) She received substantial services from that agency. (A.R. at 304-13) In that time, Ms. Tellez worked at numerous jobs that she had not been able to keep. Ms. Marme-Lowery believed this was due to her chronic mental illness. Vocational Rehabilitation had tried to help Ms. Tellez in various work environments, including fast-food restaurants, telemarketing, and janitorial work in almost empty businesses. As a Rehabilitation Counselor for DVRS, Ms. Marme-Lowery firmly believed that everyone who can work, should work. She noted that, time after time, Ms. Tellez's disability had interfered with her ability to maintain employment. She was unable to handle pressure. She did not relate well to numerous personality types. She was unable to control her temper and level of frustration. When nervous, she often would laugh inappropriately and appeared disrespectful or as not taking someone seriously. Ms. Marme-Lowery did not believe that Naomi Tellez was capable of

working a full-time competitive job. In the best of circumstances, she might, at some point, succeed in a part-time position with long-term support. (A.R. at 114) The ALJ simply found this opinion was "not consistent with the claimant's work history or the evidence as a whole." (A.R. at 30) The ALJ never acknowledged that Ms. Tellez's limited work history was only possible with support from several agencies, including Vocational Rehabilitation, the Visiting Nurses Association, and Vera French Community Mental Health Center (mental health treatment and case management).

The ALJ erred as a matter of law in failing to properly weigh the opinions from Ms. Marme-Lowery. This is error requiring reversal. Giving these opinions the appropriate weight in the context of the evidence as a whole, the overwhelming evidence in the record supports only one conclusion - that Ms. Tellez is disabled.

IV. THE ALJ FAILED TO EVALUATE MS. TELLEZ'S CREDIBILITY ACCORDING TO THE POLASKI STANDARD AND SSR 96-7P.

The standard for considering a claimant's subjective allegations is set forth fully in Polaski v. Heckler, 739 F.2d 1320, 1321-22 (8th Cir. 1984); *see* Polaski v. Heckler, 751 F.2d 943, 949 (8th Cir. 1984). In Polaski, the Eighth Circuit established that the ALJ must consider, in addition to objective medical evidence, any evidence relating to appellant's prior work record and the observations of third

parties and treating and examining physicians regarding such matters as daily activities; the duration, frequency and intensity of pain; precipitating and aggravating factors; dosage and effectiveness of medications; and functional restrictions. Polaski, 739 F.2d at 1321; *see* SSR 96-7p.

A. The ALJ Failed to Identify Inconsistencies in the Record as a Whole.

The ALJ's decision is deficient in a number of respects. First, the ALJ noted several times that Ms. Tellez had refused to take medications. (A.R. at 35; *see* A.R. at 29, 36) The ALJ, however, failed to consider the reason Ms. Tellez refused to take her medications. As she explained at the hearing:

> [T]e last time I took a pill, before that I had hurt my back and when I woke up my daughter was dead, so that didn't make, you know. I, I just, I have another daughter at home, and I'm sorry, but I'm really, I'm fearful of medication, but my anger is really getting to a point where I can't control it, and, and for my other daughter's sake and my own I agreed to take the medication.

(A.R. at 208) The record confirms that Ms. Tellez was seen for lumbar spasm on November 9, 2000. She received an intramuscular injection of Demerol and Vistaril, two potent painkillers, and prescribed Darvocet, another strong painkiller. (A.R. at 418) The record also reflects that her daughter died on Sunday, November 12, 2000. (*See* A.R. at 433) Mr. Lowe's therapy notes reflect Ms. Tellez felt

responsible for her daughter's death. (A.R. at 463) The ALJ never mentions Ms. Tellez's reasons for refusing medications and gave her explanation no weight.

The ALJ also discounted Ms. Tellez's allegations because of her work history. As previously noted, Ms. Tellez was able to work only with a great deal of assistance. The ALJ, however, confuses the need to perform part-time work to survive with the ability to perform "the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world." McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982) (en banc). Notwithstanding well-settled case law, this mandate is frequently ignored, and appears to have been in this case. *See* Forehand v. Barnhart, — F.3d — 2004 WL 875721 (8th Cir. April 26, 2004) (citing cases); Shaw v. Apfel, 220 F.3d 937, 939 (8th Cir. 2000). An ALJ should not penalize a claimant who, prior to an award of benefits, attempts to make ends meet by working in a modest, part-time job. Cline v. Sullivan, 939 F.2d 560, 565-66 (8th Cir. 1991). Ms. Tellez's minimal work should not be held against her.

B. The ALJ Ignored Third Party Observations from Numerous Independent Sources.

The ALJ ignored the observations of numerous third parties. Sue Himes, a Family Support Worker at the Genesis Visiting Nurse Association, began working

with Ms. Tellez in November I999 and Naomi completed the program in August 2000. During this nine month period, Ms. Himes noticed Ms. Tellez's depression restricted her quality of life. She was unable to sleep, very tearful, and unable to leave her home at times even to go walking with Ms. Himes. During this period, Ms. Tellez became very depressed, very emotional, and at times talked of suicide. Her parenting skills and overall life skills were affected by her depression. (A.R. at 477)

Ms. Himes' statement is consistent with the VNA's records. From December 1999 until services ended in August 2000, Ms. Tellez's home was consistently "messy" or "dirty" (or both). (A.R. at 482, 484, 490, 493, 496, 499, 502, 577, 579, 582; *see* A.R. at 577 - "very messy") She has been "very tearful" (A.R. at 579, 482), "very depressed" and tearful (A.R. at 594), and upset (A.R. at 485) On several occasions, she has been sleepy (A.R. at 490, 493, 499), just woke up (A.R. at 579), has just laid on the couch (A.R. at 496), or has been in her pajamas (A.R. at 490).

The statement of Ms. Himes is also consistent with the hearing testimony of Karen Havenicht, Ms. Tellez's case monitor at Vera French. (A.R. at 181) Ms. Havenicht had observed Ms. Tellez's crying spells. Ms. Tellez had a different case monitor prior to Ms. Havenicht and they had discussed Ms. Tellez's case. Ms. Havenicht helped Ms. Tellez move and knew her well. Ms. Havenicht had seen Ms.

Tellez cry for more than half an hour. She isolated herself and shut down. (A.R. at 183)

Ms. C. McKanna, a claims representative for the Social Security Administration, also commented on Ms. Tellez's demeanor as she applied for benefits in March 2000:

> Ms. Tellez's emotional state was sporadic at times during the interview. She vacillated from bouts of tears and states of agitation to periods of repose and smiles. She had difficulty recalling dates of employment and medical sources. Her caseworker from Vera French Mental Health Center, Darin Brown, who is her third party contact, accompanied her to the interview.

(A.R. at 268)

Similarly, Terri Hudnall from Frontier Supported Community Living Program, noted in March 2002 that Ms. Tellez had episodes of severe depression and hopelessness. (A.R. at 478)

Finally, the record includes a statement from Kismet J. James, Naomi's sister. Ms. James noted Ms. Tellez frequently had trouble concentrating and lost her train of thought when talking to people or doing things. She had little patience and became upset very easily. When she became upset, she often became hysterical and unable to control herself. Many times, she would cry for several

hours. (A.R. at 340) She frequently isolated herself and would not answer the phone. At times, she would miss work when isolating herself. (A.R. at 341)

Counsel can find no reference whatsoever to the statement of Ms. Tellez's sister, Kismet James (A.R. at 340-41); the observations of Ms. C. McKanna, the Claims Representative (A.R. at 268); or the report of Ms. Hudnall (A.R. at 478) in the ALJ's decision. He failed to acknowledge Ms. Havenicht's hearing testimony regarding Ms. Tellez's crying spells. (A.R. at 34; *see* A.R. at 181-83) The ALJ's failure to consider this important and disinterested third party testimony is error. The evidence as a whole is consistent with Ms. Tellez's claim for disability. The ALJ erred in his Polaski analysis.

CONCLUSION

A recurring issue in the judicial review of disability claims is the proper remedy – remand for further proceedings or remand for the calculation and payment of benefits. The First Circuit recently considered in detail the proper remedy in a Social Security case. Seavey v. Barnhart, 276 F.3d 1(1st Cir. 2001). The First Circuit held that an award of benefits was the proper remedy where proof of disability is "overwhelming"; where proof of disability is "very strong and there is no contrary evidence"; or where correcting legal error "clarified the record sufficiently that an award or denial of benefits was the clear outcome." Seavey, 276

F.3d at 11. Remand for further proceedings is the proper remedy where an essential factual issue has not been resolved and there is no clear entitlement to benefits; or where the ALJ has not considered all relevant factors in taking action; or where the ALJ has provided insufficient explanation for its action. Seavey, 276 F.3d at 11-12.

The ALJ's decision should be reversed and this matter remanded for the calculation and payment of benefits. The overwhelming evidence from the treating psychiatrist (Dr. Garside), the treating nurse practitioner (Ms. Flaherty), the consultative examiner (Dr. Hoover), the non-examining state agency psychological consultants (Dr. Kazmierski and Dr. Garfield), the Vocational Rehabilitation counselor (Ms. Marme-Lowery), the Visiting Nurses Association (Ms. Himes), the case manager (Ms. Havenicht), the Claims Representative (Ms. McKanna), and the sister (Ms. James) is consistent with only one conclusion – that Ms. Tellez is disabled and entitled to benefits.

For the reasons stated above, this Court should reverse the final agency decision and enter judgment under 42 U.S.C. §1383(c)(3) (incorporating sentence four of 42 U.S.C. §405(g)). This matter should be remanded for the calculation

and payment of benefits. Alternatively, this Court should reverse the ALJ's decision and remand this matter for further proceedings.

Respectfully submitted,

JOHN A. BOWMAN
Bowman & DePree, L.L.C.
617 Brady Street
Davenport, Iowa 52803
Phone: (553) 323-6685
Fax: (563) 333-2499
E-mail: Jbowman18@aol.com

Thomas A. Krause
Thomas A. Krause, P.C.
701 34th Place
West Des Moines, Iowa 50265
Phone: (515) 223-1777
Fax: (515) 223-1441
E-mail: Takrause1@aol.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that on May 8, 2004, I served two hard copies of the foregoing document and a 3½ inch virus-free diskette containing the word-processing file for Appellant's Brief by delivering a copy to the parties or attorneys of record noted below.

_____

Copy to:

Christopher D. Hagan, AUSA
286 Courthouse Annex
110 East Court Avenue
Des Moines, Iowa 50309

CERTIFICATE OF COMPLIANCE

I certify, pursuant to F.R.App.P. 32(a)(7), that this principal brief contains no more than 14,000 words. As indicated by the word-processing program used to prepare this brief, Corel WordPerfect for Windows 10, the actual word count for the entire Appellant's Brief is 10,186 words, excluding table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel. This Brief was prepared with 14 point Times New Roman font, a proportionally spaced face with serifs.

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Thomas A. Krause